STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2013
v	No. 310591 Kalamazoo Circuit Court
BRET JOSEPH FRAME, Defendant-Appellant.	LC No. 2011-000981-FC

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant, Bret Joseph Frame, of two counts of second-degree murder, MCL 750.317, and two counts of operating a motor vehicle while intoxicated causing death, MCL 257.625(4)(a).[1] The trial court sentenced defendant to 360 to 900 months' imprisonment for each of the murder convictions and to 7 to 15 years' imprisonment for each of the operating-while-intoxicated convictions. Defendant appeals as of right. We affirm.

I. BASIC FACTS

This case arises out of an incident of drunk driving by defendant in Texas Township on June 23, 2011, that resulted in the tragic deaths of Justin Bailey and Mark Angelocci in an automobile accident. The evidence at trial established that defendant is, by his own admission, "an extreme alcoholic" who began abusing alcohol when he was 15 years old. In August 2010, defendant was convicted of operating while impaired by intoxicating liquor. He was also kicked out of his parents' home because his drinking made him, according to his mother, "verbally obnoxious" and "hard to live with." Although defendant attempted to turn his life around by going back to school and purportedly remaining sober for eight months, he decided to consume alcohol on June 23, 2011. Defendant's recollection of that day is incomplete. Testimony at trial

[1] Defendant also pleaded no contest to one count of maliciously destructing police property, MCL 750.377b, and two counts of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant to 2 to 4 years' imprisonment for the malicious-destruction conviction and to 14 to 24 months' imprisonment for each of the convictions for assaulting, resisting, or obstructing a police officer. These convictions are not at issue on appeal.

established that defendant recalled driving around drinking alcohol during the day, visiting a friend, and leaving the friend's home between 2:00 p.m. and 3:00 p.m. Although defendant's next cognizant memory was waking up in jail, numerous witnesses at trial testified about what happened next.

Defendant—while highly intoxicated—drove his pickup truck in Texas Township and the immediate vicinity in a reckless, dangerous, and alarming manner that included illegally passing and almost hitting other motorists and driving at speeds estimated as high as 100 mph on roads with speed limits of 45 and 55 mph. At about 3:30 p.m., defendant rear-ended Bailey's vehicle while both vehicles were heading south on South Sixth Street, causing Bailey's vehicle to spin and ultimately vault into a tree on the other side of the street. Defendant did not stop but, instead, continued driving until he reached his home, where sheriff's deputies, after witnesses provided information implicating defendant, found him at 4:40 p.m. sitting slumped in the driver's seat of his truck with his eyes closed. When the deputies ordered defendant out of his truck, he smelled of intoxicants and exhibited physical signs of intoxication, including glassy eyes, slurred speech, and unsteady balance. Defendant became defiant and violent when the deputies attempted to handcuff him, and a deputy had to use a taser to subdue him. During transport to a hospital, defendant continued to act belligerently, threatening to kill and eat the face of the deputy who was driving the patrol car and repeatedly hitting his own head against the car's Plexiglas partition. At the hospital, defendant's blood was drawn at 6:58 p.m. despite his continued unruly behavior. Testing established that defendant's blood-alcohol level was 0.25 grams per 100 milliliters of alcohol in blood.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence of malice at trial was insufficient to sustain his convictions for second-degree murder.

When examining a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the elements of the charged offense beyond a reasonable doubt. *People v Nix*, 301 Mich App 195, 199; 836 NW2d 224 (2013). Evidentiary conflicts must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences arising from such evidence can be satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "Minimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

"Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Thus, "malice may be established even absent an actual intent to cause a

particular result if there is wanton and wilful disregard of the likelihood that the natural tendency of a defendant's behavior is to cause death or great bodily harm."[2] *Id.* at 466. Not all cases of drunk driving resulting in death justify proceeding to trial on charges of second-degree murder. *Id.* at 469. Malice requires egregious circumstances and, in cases involving drunk driving, is signified by "a level of misconduct that goes beyond that of drunk driving." *Id.* at 467, 469.

At trial, several witnesses testified about defendant's history of alcoholism. Defendant himself admitted to Detective Jeffrey Baker on the day after the accident that he is an "extreme alcoholic." Defendant had a previous conviction in 2010 for operating while impaired by intoxicating liquor. Connie Wentzel, a friend of defendant's family, voiced her concern to defendant that he could hurt somebody by drinking and driving. Defendant's parents kicked him out of their home because his drinking made him verbally obnoxious and hard to live with. And two witnesses testified that defendant attended a victim impact panel run by Mothers Against Drunk Driving (MADD) in November 2010; the panel addressed the consequences of alcohol-impaired driving. A rational trier of fact could reasonably infer that defendant knew on the day of the accident not only that he should not drink and drive but also that he could hurt someone by doing so. See *Carines*, 460 Mich at 757.

Defendant nevertheless chose to consume alcohol and drive on the day of the accident. Defendant told Detective Baker that had been driving around drinking during the day. Defendant recalled leaving his friend's home between 2:00 p.m. and 3:00 p.m. Defendant told Detective Baker that his next cognizant memory after leaving his friend's home was waking up in jail. Defendant could not remember the accident, which the evidence at trial indicates occurred at about 3:30 p.m. Defendant's statements to Detective Baker are significant considering defendant's contention on appeal that he consumed the alcohol after the accident. On the basis of defendant's recollection of drinking alcohol on the day of the accident and his inability to recall what happened to him after leaving his friend's home, a rational trier of fact could conclude that defendant consumed alcohol before leaving his friend's home and, thus, before the accident. If defendant remembered drinking alcohol on the day of the accident but could not recall what happened after leaving his friend's home, he must have consumed the alcohol before leaving his friend's home—the period of time within his recollection. This conclusion is consistent with the testimony of Michele Glinn, an expert in the areas of alcohol absorption and the toxicological effects alcohol on the human body, regarding alcohol-induced memory loss: "[Y]ou should be able to remember what happened before you started drinking or . . . earlier that day before you had anything in your system." "[Y]ou remember what happened when you're sober and you might remember what happened as you started drinking." But when your blood-alcohol level is at 0.15 or 0.2, depending on the person, there might be gaps where you do not remember what happened.

[2] We note that "[w]ith respect to the element of malice encompassing wanton and willful disregard, . . . voluntary intoxication is not a defense." *People v Langworthy*, 416 Mich 630, 651; 331 NW2d 171 (1982).

The testimony at trial illustrated that defendant drove while highly intoxicated. When the deputies who arrested defendant arrived at his home about one hour after the accident, defendant was sitting in the driver's seat of his truck; he was slumped and had his eyes closed. There was a noticeable odor of intoxicants coming from him. When the deputies got defendant's attention, he started to yell. His speech was slurred, and his eyes were "glassy" and had a "sleepy look." When defendant eventually complied with the deputies' instruction to exit his truck, he had to lean against the truck because his balance was unsteady. Defendant then became defiant. He fought with the deputies and threatened to kill Deputy Michael Cattell. According to Deputy Peter Vandeweerd, defendant was "out of control," and a taser had to be used to subdue him. After defendant was arrested and placed into a police cruiser, he kicked at the cruiser's windows and banged his head against the partition. The deputies then transferred defendant to Deputy Paul Runcie's vehicle so that he could be taken to the hospital for a blood-alcohol test; defendant could not stand on his own; he threatened to kill Deputy Runcie and eat Deputy Runcie's face. Defendant said that he would kill somebody if Deputy Runcie did not let him go. On the way to the hospital, defendant was "[e]xtremely belligerent." He banged his head on the vehicle's Plexiglas partition, spit in the vehicle, and continued his threats to Deputy Runcie.

At the hospital, defendant continued to be unruly and had to be moved in a wheelchair because he could not walk. Defendant refused to remain in the chair and stated, "[F]uck you, I'm drunk." He told hospital security personnel that he was going to kill somebody. The result of a blood-alcohol test performed on defendant at 6:58 p.m., about three hours and thirty minutes after the accident, was 0.25 grams per 100 milliliters of alcohol in blood, three times the legal limit, see MCL 257.625(1)(b).[3] "[A] chemical test, regardless of the amount of time before the test is actually performed, is assumed to be a reasonable approximation of a person's blood alcohol level at the time of the offense." *People v Campbell*, 236 Mich App 490, 496; 601 NW2d 114 (1999). "[B]lood alcohol test results are statutorily deemed to relate back to the time of the alleged offense." *Id.* at 497; see also MCL 257.625a. Defendant's memory loss on the afternoon of the accident indicates that he consumed a substantial amount of alcohol. Moreover, there was testimony that defendant's head was moving "back and forth" in a side-to-side motion when he was driving on South Sixth Street before the accident, which a rational trial of fact could reasonably infer was a physical manifestation of high intoxication while driving when considered in light of the other evidence of defendant's alcohol consumption and intoxication.

Finally, defendant's conduct in this case consisted of more than driving while highly intoxicated. The evidence at trial illustrated that, before, during, and after the accident, defendant drove in an outrageous manner such that he was a significant threat to the safety and lives of surrounding motorists. Specifically, the evidence showed that Timothy Keesee encountered defendant on South Sixth Street on the day of the accident between 2:30 p.m. and 3:00 p.m. Keesee testified that a truck "came out of nowhere at a very high rate of speed" and almost hit the rear of his vehicle. Keesee braced for impact because he thought the truck was going to hit him—the incident "took [his] breathe away." The truck cut back into Keesee's lane

[3] Glinn testified that a 240-pound man with a 0.25 blood-alcohol content represents a consumption of 15 "standard drinks," i.e., one beer or one shot of 80 proof liquor.

and almost hit the front bumper of Keesee's vehicle. Keesee estimated that the truck was going potentially 100 mph. Keesee contacted the authorities as a result of this incident.

The testimony of Ryan Patterson and Sarah Onderlinde evidences that they encountered defendant at about 3:30 p.m. when they were each driving south on South Ninth Street through "average" traffic on their way to work. Defendant's truck, which was going south toward Kalamazoo Valley Community College, passed Patterson at a high rate of speed in a turning lane to his left and, according to Onderlinde, flew by her through an intersection. Both Patterson and Onderlinde estimated that the truck was going at least 80 mph. Onderlinde testified that the truck passed her closer than a normal vehicle would and that her minivan shook—the incident "got [her] heart rate going." Patterson testified that the speed limit on South Ninth Street was 45 mph.

The evidence at trial established that Todd Handley also encountered defendant on South Ninth Street. Both Handley and defendant were driving southbound when defendant's truck went around Handley and a white sport utility vehicle by crossing a solid yellow line into a deceleration or turning lane and then cutting back in front of them. The incident caused Handley to predict to his son, who was a passenger in Handley's vehicle, that the driver of the truck would get into an accident; as a teaching moment, Handley warned his son not to drive out of control like the truck that they had seen. Handley estimated that the truck was going 100 mph and testified that "it seemed like we were standing still." Handley continued to follow defendant and saw him approach a 90-degree turn at a high rate of speed, make the turn, and continue onto West O Avenue and past Eighth Street. At the intersection of West O Avenue and Eighth Street, West O Avenue reduced from five lanes to two lanes, and the speed limit increased from 45 mph to 55 mph. West O Avenue also became "very hilly," such that "you can't see beyond the next hill," and a no-passing zone. Handley saw defendant come up behind a red car at the bottom of a hill and pass it by crossing a double yellow line. Defendant's truck appeared to be accelerating. Defendant then turned left onto South Sixth Street; Handley estimated that he was four-tenths of a mile behind defendant. When Handley turned left onto South Sixth Street, he could no longer see defendant's truck.

Tracey Barber-Hageman and Jeffrey Suzor each encountered defendant heading south on South Sixth Street near the intersection of P Avenue at about 3:30 p.m. Trial testimony illustrated that South Sixth Street is a "quite hilly" two-lane road with a speed limit of 55 mph; however, there is a sign suggesting a speed of 45 mph, and there is also an advisory sign indicating a side road. Except for a few areas, the road is a no-passing zone. Defendant's mother opined at trial that it would be foolish to speed on South Sixth Street because of the potential for other vehicles to come in front of you. Suzor was standing outside the doorway of his workplace when he saw a "green flash" that he believed was defendant's truck. Hageman was waiting at a stop sign to turn onto South Sixth Street when she saw a truck driving "extremely fast"—faster than she had ever seen a vehicle drive on South Sixth Street in her 15 years of living in the area. Her initial impression was that the truck "had to be going a hundred miles an hour." Suzor testified that the truck was going "75, 80, somewhere—fast." After the truck passed, Suzor heard a "smash."

Sergeant James Campbell, an accident reconstructionist, testified that when defendant's truck hit Bailey's car, the truck was not entirely in the southbound lane. The left rear of

defendant's truck was over the yellow line, and the right front of the truck was just off the yellow line. Defendant's truck was coming from the center of the road toward the right shoulder and hit Bailey's car in the rear and at an angle, causing the car to rotate. Sergeant Campbell opined that at the time of impact, defendant was going at least 72 mph and Bailey's car was going 45 mph. There were no signs of braking. After the collision, defendant's truck continued on the right shoulder for about 375 feet until it came back into the roadway.

Notwithstanding the accident that sent an occupied vehicle into a tree, defendant did not stop his truck. The trial testimony of Sean Batts and Charles Stoker established that defendant continued his dangerous driving after the accident. Both Batts and Stoker testified that they were at the Crooked Lake Market at about 3:30 p.m. when they saw defendant's truck negotiate the curve near the market at an alarming speed and continue onto PQ Avenue. The truck was over the center line, and its tires were squealing. Stoker estimated that defendant negotiated the curve by driving at least 40 mph; Stoker testified that he personally drives around the curve at 20 mph in order to make a comfortable turn.

Viewing this evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence for a rational trier of fact to conclude that the prosecution proved beyond a reasonable doubt that defendant acted with wanton and willful disregard of the likelihood that the natural tendency of his conduct would be to cause death or great bodily harm. Defendant knew he was an extreme alcoholic, that he should not be drinking and driving, and the consequences of drunk driving; nevertheless, he chose to consume alcohol and drive while highly intoxicated. Further, "[t]his is not a case where a defendant merely undertook the risk of driving after drinking." *People v Werner*, 254 Mich App 528, 533; 659 NW2d 688 (2002). Defendant drove in a manner such that he was a significant threat to the safety and lives of surrounding motorists; this was evidenced not only by the outrageous manner of his driving but also by the reactions of his fellow motorists indicating that defendant was not just a motorist violating traffic laws but a significant danger to the safety of others worthy of police intervention. Making matters worse, defendant was driving in an area close to his home; a rational trier of fact could reasonably infer that defendant was aware that the nature of his driving was dreadfully inappropriate in light of the familiar posted and recommended speed limits, no-passing zones, side streets, hills, and 90-degree turns.

Accordingly, there was sufficient evidence of malice to convict defendant of second-degree murder.[4]

B. LESSER-INCLUDED OFFENSE INSTRUCTIONS

[4] In light of this conclusion, any error in the decision to bind defendant over for trial on charges of second-degree murder would be rendered harmless. See *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010) ("[T]he presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless."). Nonetheless, having reviewed both defendant's argument regarding bindover and the evidence presented at the preliminary examination, we conclude that defendant was properly bound over for trial on charges of second-degree murder.

Defendant also argues that the trial court's failure to instruct the jury on the lesser-included offenses of reckless driving causing death and moving violation causing death violated his constitutional right to a fair trial.

Whether an offense is a lesser-included offense is a question of law that this Court reviews de novo. *People v Heft*, 299 Mich App 69, 73; 829 NW2d 266 (2012). "[A] trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Whether instructional error violates a defendant's constitutional rights is a question of law that this Court reviews de novo. See *Heft*, 299 Mich App at 73.

"The trier of fact may find a defendant guilty of a lesser offense if the lesser offense is necessarily included in a greater offense." *Id.* "If the trial court does not instruct the jury on a lesser included offense, the error requires reversal if the evidence at trial clearly supported the instruction." *Id.* "However, the trier of fact may only consider offenses that are 'inferior to the greater offense charged.' The trier of fact may *not* consider cognate offenses." *Id.* at 74, citing *People v Cornell*, 466 Mich 335, 354-355; 646 NW2d 127 (2002). "Cognate offenses share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *People v Mendoza*, 468 Mich 527, 532 n 4; 664 NW2d 685 (2003). "To be a lesser included offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the lesser offense. The elements of the lesser offense are subsumed when '*all* the elements of the lesser offense are included in the greater offense . . . .'" *Heft*, 299 Mich App at 74.

The trial court in this case denied defendant's request to instruct the jury on the offenses of reckless driving causing death, as a lesser included offense of second-degree murder, and moving violation causing death, as a lesser included offense of operating a motor vehicle while intoxicated causing death. The trial court explained that it could only instruct on necessarily included lesser offenses, not cognate lesser offenses. On appeal, defendant has neither established nor argued that the offenses are necessarily included lesser offenses.[5] Indeed, defendant apparently agrees with the trial court's conclusion that he was not requesting

[5] We note that reckless driving causing death, MCL 257.626, requires the operation of a vehicle as an element of the offense, whereas second-degree murder does not, *Goecke*, 457 Mich at 463-464. Moving violation causing death, MCL 257.601d, includes a "moving violation" as an element of the offense; however, operating while intoxicated causing death, MCL 257.625, does not speak of "moving violation" as an element of the offense; rather, it requires, as separate elements, (1) the operation of a motor vehicle (2) on a highway or other place open to the public (3) while intoxicated, and (4) a defendant's voluntarily decision to drive knowing that he or she had consumed alcohol and might be intoxicated, see MCL 257.625; CJI2d 15.11. See also, generally, *People v Martin*, 271 Mich App 280, 295-296; 721 NW2d 815 (2006) (explaining that the statutory language of a particular offense can indicate that the Legislature did not intend the offense to be considered a necessarily included lesser offense of another offense); MCL 257.601d(3).

instructions for necessarily included lesser offenses by emphasizing that jury instructions on cognate offenses are forbidden under *Cornell*, failing to make any argument that the offenses are not cognate offenses, and by making an argument solely on constitutional grounds to get around *Cornell*. Specifically, defendant argues that notwithstanding the prohibition on instructing the jury on cognate offenses, the trial court's failure to instruct on such offenses is required by due process where the evidence warranted the instructions. In support of his argument, defendant cites the United States Supreme Court's decisions in *Beck v Alabama*, 447 US 625; 100 S Ct 2382; 65 L Ed 2d 392 (1980) and *Hopper v Evans*, 456 US 605; 102 S Ct 2049; 72 L Ed 2d 367 (1982). However, *Beck* and *Hopper* are inapposite to this case as both are death-penalty cases standing for the rule that "the sentence of death [cannot] be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense, provided that the evidence would have supported such a verdict." *Hopper*, 456 US at 609; see also *Beck*, 447 US at 627. Defendant does not provide this Court with any authority for the proposition that due process requires a court in noncapital cases to instruct a jury on cognate offenses.

Accordingly, defendant has not demonstrated a violation of his constitutional rights.

C. SUBJECTIVE-INTENT INSTRUCTION

Next, defendant argues that the trial court erred by failing to provide a subjective-intent instruction for purposes of second-degree murder.

We review de novo jury instructions that involve questions of law and for an abuse of discretion a trial court's determination of whether an instruction is applicable to the facts of a case. *Gillis*, 474 Mich at 113. Furthermore, we review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). "To warrant reversal of a conviction, the defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict." *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009).

A defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). A trial court must instruct the jury not only on all the elements of the charged offense, but also on material issues, defenses, and theories that are supported by the evidence. *People v Anstey*, 476 Mich 436, 453; 719 NW2d 579 (2006). "Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

As previously discussed, malice for purposes of second-degree murder includes "the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke*, 457 Mich at 464. The standard jury instruction for second-degree murder reads as follows regarding the element of malice:

> (3) Second, that the defendant had one of these three states of mind: [he / she] intended to kill, or [he / she] intended to do great bodily harm to [*name*

> *deceased*], or [he / she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his / her] actions. [CJI2d 16.5.]

In *Goecke*, our Supreme Court expressly declined to decide the issue of whether "the third form of malice requires a subjective or objective intent" because there was sufficient evidence under either standard to support the bindover and convictions in the cases before it. *Goecke*, 457 Mich at 465 n 26. However, the Court noted in dicta that "[o]nly a highly unusual case would require a determination of the issue whether the defendant was subjectively aware of the risk created by his conduct." *Id.* at 464. The Court explained in a footnote that

> [m]ost depraved-heart murder cases do not require a determination of the issue of whether the defendant actually was aware of the risk entailed by his conduct; his conduct was very risky and he himself was reasonable enough to know it to be so. It is only the unusual case which raises the issue—*where the defendant is more* absent-minded, stupid or *intoxicated than the reasonable man*. [*Id.* at 465 n 25 (emphasis added).]

In *Werner*, 254 Mich App at 533, this Court held that "an advanced state of voluntary intoxication is not sufficient to qualify as the sort of 'unusual case' that requires a subjective determination of awareness under *Goecke*." We emphasized that "*Goecke* did not expressly prescribe a subjective analysis for malice in cases of extreme intoxication." *Id.* at 532. Furthermore, we explained that if a case of extreme intoxication constituted an "unusual case" requiring a subjective determination of awareness,

> it would mean that moderately intoxicated drivers could be tried for and convicted of second-degree murder while severely intoxicated drivers would be excused because they were too intoxicated to know what they were doing. This would be contrary to the *Goecke* Court's statement that "malice requires egregious circumstances." It also would effectively create for some defendants an intoxication defense to second-degree murder, which would be plainly contrary to the *Goecke* Court's holding that voluntary intoxication is not a defense to a second-degree murder charge. [*Id.* at 532-533.]

On appeal, defendant contends that the trial court erred by failing to provide a subjective-intent "limiting" instruction for purposes of second-degree murder, arguing that the facts of instant case make it an "unusual case" requiring use of a subjective standard. We disagree. The trial court in the instant case used CJI2d 16.5 when instructing the jury on the element of malice for second-degree murder. The instruction regarding malice in CJI2d 16.5 is reflective of the definition of malice under Michigan law. See CJI2d 16.5; *Goecke*, 457 Mich at 464. Further, the instant case, like *Werner*, is a case of extreme or advanced intoxication. Under *Werner*, defendant's advanced state of voluntary intoxication does not qualify as an "unusual case" justifying use of a subjective standard. See *Werner*, 254 Mich App at 533.

Defendant attempts to distinguish this case factually from *Werner*, arguing that there was no evidence that he knew his level of intoxication and no evidence that he had received a warning that he was driving too fast. Essentially, defendant is arguing that there was no

evidence of subjective intent. We reject this argument. Although the instant case is factually different from *Werner* with respect to what evidence was offered at trial to establish malice, both cases involve an extreme or advanced state of intoxication. Defendant should not be excused from conviction of second-degree murder because he chose to become too intoxicated to know or remember what he was doing. See *id.* at 532-533. Furthermore, defendant's argument that a subjective standard should be used because there was no evidence of subjective intent advocates, in effect, that the prosecution must prove both objective and subjective awareness because if evidence to satisfy both standards is not advanced, the standard for which there is insufficient evidence will be the standard used to analyze intent. There is no basis in law for this.

Accordingly, we conclude that both the trial court's malice instruction under CJI2d 16.5 and its refusal to give a limiting subjective-intent instruction were consistent with Michigan law; the trial court's instructions fairly presented to the jury the issues to be tried and sufficiently protected defendant's rights. See *Milton*, 257 Mich App at 475.

D. EXPERT TESTIMONY

Defendant's final argument is that the trial court abused its discretion by refusing to allow expert testimony from Charles Simpson regarding the statistical likelihood that an alcohol-related accident in Kalamazoo would result in fatalities or injuries.

"This Court reviews a trial court's admission, exclusion, or limitation of expert testimony for abuse of discretion." *People v Hardesty*, 139 Mich App 124, 133; 362 NW2d 787 (1984). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013).

Evidence, including expert testimony, must be relevant to be admissible. MRE 402; *People v Ackerman*, 257 Mich App 434, 444; 669 NW2d 818 (2003). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

With respect to expert testimony, MRE 702 provides as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MRE 704. "The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case." *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986). The party proffering the expert bears the burden of persuading the trial court that the expert has specialized knowledge that will aid the factfinder in understanding the evidence or

determining a fact in issue. *Id.* at 112. Addressing how to determine whether expert testimony would aid the trier of fact, our Supreme Court has opined as follows:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. [*Id.* at 106 (quotation marks and citation omitted).]

In this case, data from the 2010 Michigan Annual Drunk Driving Audit[6] was admitted into evidence at trial. However, the trial court prohibited Simpson from providing the following testimony on the basis of a statistical analysis of the data:

> Based upon only the data provided on this sheet and the four statistical analysis, there is a 95 percent probability that the injury crashes where alcohol was involved the injury crash was not caused by alcohol; and there's a 95 percent probability, based upon only the data presented here and the statistical analysis which I conducted that the fatal crashes here, that the fatalities were not caused by alcohol involved.

The court determined that expert testimony was not needed for the jury to determine the likelihood that the natural tendency of defendant's behavior was to cause death or great bodily harm. The court opined as follows:

> I don't think it's relevant to the issue that the jury needs to decide. It's a very limited audit that he's basing that decision on, and it's–And, again, it's not answering the question in this particular case. He can't answer that question. The jury can sort through that based on the evidence that's been presented. And I think it's irrelevant because it's–Again, it's a vague question related to a specific audit. We don't even have a national or worldwide audit where we're dealing with those numbers, not that I would let that in either.
>
> But I'm not going to let him answer that question. I don't see how it's relevant, and I don't believe we need an expert to testify as to causation. That is within the realm of the jury. I think they can figure that one out on their own without an expert.
>
> * * *

[6] The data in the audit is "a compilation of accidents involving alcohol, drugs-alcohol or drugs, no alcohol, that resulted in injury or death for the year 2010." The data is limited to Kalamazoo County.

> The jury's not asked to perform a mathematical equation to make a determination in this case. They're not asked a statistical question in this case. We're not dealing with what are the odds in this case.
>
> What we are dealing with in this case are the–are the facts, the specific facts of this case. And the jury can sort through those facts, and they can draw their conclusion.

We conclude that the trial court did not abuse its discretion by excluding Simpson's testimony for the reasons that it was irrelevant and would not assist the jury in determining a fact in issue. The jury in this case was tasked with determining whether defendant acted in willful and wanton disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. Untrained laymen would be qualified to determine this issue intelligently and to the best possible degree without Simpson's statistical testimony. See *id.* at 106. The jury in this case could examine defendant's conduct and, using their common sense and experience, determine whether the natural tendency of his behavior as a whole and in light of the circumstances was to cause death or great bodily harm. See, generally, *People v Lytal*, 119 Mich App 562, 576; 326 NW2d 559 (1982) (a jury may employ common sense and experience).

Simpson's statistical conclusion regarding the probability of alcohol causing injury in injury crashes and death in fatal crashes based on a compilation of data from crashes in Kalamazoo in 2010 does not make it more probable or less probable that the natural tendency of *defendant's behavior in this case* was to cause death or great bodily harm. The data from the audit relied upon by Simpson was limited in scope as it addressed only one element of defendant's conduct to be evaluated by the jury: driving after drinking alcohol. The data did not account for the presence or absence of a variety of variables that may further define the conduct to be examined by a jury, e.g., blood-alcohol level, the manner of defendant's driving, the speed limit, the nature of the road, the presence of other motorists, weather conditions, etc. All of these variables, when considered in light of defendant's intoxication, affect the likelihood that the natural tendency of defendant's behavior was to cause death or great bodily harm. Here, the jury had to consider all of the facts of defendant's case to determine whether defendant's misconduct rose to the level of second-degree murder—facts that go beyond simply whether alcohol was involved. To qualify as second-degree murder, defendant's misconduct had to exceed mere drunk driving causing death. See *Werner*, 254 Mich App at 533. Not every case of drunk driving causing death constitutes second-degree murder. See *Goecke*, 457 Mich at 469. The circumstances of the case must be egregious. *Id.* at 467.

Accordingly, the trial court's decision to exclude Simpson's testimony did not fall outside the range of principled outcomes.

Finally, we note that defendant argues in his appellate brief that "[t]here are constitutional dimensions" to this issue that "implicate [his] ability to present a defense"; however, defendant fails to give any analysis or explanation as to how his ability to present a defense was impaired at trial. We also note that defendant appears to make an allegation of instructional error, arguing in a cursory one-sentence fashion that the court refused to give "an instruction" predicated on Simpson's proffered testimony; however, defendant does not explain what instruction predicated on Simpson's proffered testimony the court should have given. Accordingly, defendant has

abandoned both issues. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006); *People v Huffman*, 266 Mich App 354, 371; 702 NW2d 621 (2005).

Affirmed.

/s/ E.Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering